United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4076

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NAZARETH REGIONAL HIGH SCHOOL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND CROSS-APPLICATION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN CASE NO. 222 NLRB NO. 156

B
P/S

BRIEF ON BEHALF OF PETITIONER NAZARETH REGIONAL HIGH SCHOOL

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Statement Of The Case

and

Preliminary Statement

On February 24, 1976, the National Labor Relations Board ("the Board") issued its decision in 222 NLRB No.156 finding, contrary to its Administrative Law Judge, that Petitioner, Nazareth Regional High School, ("Petitioner" or "Nazareth") had violated Sections 8(a)(5)(3)&(1) of the Act by refusing to recognize and bargain with the Lay Faculty Association, ("Union"), by unilaterally fixing its initial terms and conditions of employment, by refusing to hire James Mirrione because of his union activities, and by the action of certain supervisors in causing anti-union petitions to be circulated among the faculty.

The findings and conclusions of the Board are based upon the alleged successor employer status of Petitioner which had taken over the ownership and operation of the Nazareth Diocesan High School from the Henry Hald High School Association ("Hald") on September 1, 1974. The obligation to bargain imposed upon Nazareth rests squarely upon the Board's finding that the expired contract between the Union and Hald gave rise to a legal presumption of continued majority status of the Union at the new institution which Petitioner failed to rebut by its assertion of a good faith doubt concerning majority. With respect to the violations of Section 8(a)(1), the Board found that the supervisory participation in the circulation of the anti-union letter and petition in the spring and fall of 1974 was attributable to Petitioner notwithstanding that the same supervisors had been covered by the collective bargaining agreement and were, at all material times, the object of the Union's representational claims. Concerning the violation of Section 8(a)(3),

the Board's finding that Petitioner had refused employment to James Mirrione because of his claimed union activities is based upon the alleged violations of Section 8(a)(5) and (1) and because of Petitioner's failure to offer an explanation acceptable to Mirrione for its refusal to hire him.

In reaching its conclusions of law, the Board has subverted the record. Every fact, inference or nuance supportive of the Board's position has been gleaned from the testimony and exhibits and carefully inserted into its decision, while whole blocks of testimony and, indeed, basic stipulations have been ignored. The two basic touchstones of the ALJ's decision, viz; 1) the inapplicability of the presumption of continuing majority to the unusual facts of this case and 2) the preclusion of a bargaining order because of the heavy involvement of supervisors in the Union hierarchy and their inclusion in the Union's unit demand, were not even mentioned let alone considered by the Board.

In discussing the issue of whether a bargaining order based upon the presumption of continuing majority was warranted, the ALJ stated:

> "And as is true of all cases starting with presumptive proof, all matters of record which bear a logical relationship to the factual issue must in all fairness be considered. And finally, in such a situation, no out of context selection of only certain pertinent factors can be permitted to decide the question."
>
> (31a)

Had the Board followed that standard, it would never have reached the conclusions which appear in its decision.

STATEMENT OF THE FACTS

In the latter part of 1973 the Henry M. Hald High School Association announced that effective August 31, 1974 it would cease to operate Nazareth High School in Brooklyn, New York, and that the school would be turned over to a lay board of trustees who would operate the school on an independent basis (TR-302). At the time Nazareth was an integral part of a multi-school bargaining unit whose faculty members were covered by a collective agreement between the Union and Hald. Because of elements of uncertainty surrounding the transfer of the property and the possible consequences for the teachers employed at the school, Union president Robert Gordon wrote to the acting chairman of the lay board, Thomas Keenan, in early March 1974 and demanded recognition as the representative of the teachers at the school. At the time the lay board was in its formative stages and had not as yet hired any teachers for the school year commencing in September 1974, nor had it obtained a charter from the New York State Board of Regents. Nevertheless Gordon persisted in his demand for recognition for all teachers to be employed by the new school, which in its application for a charter was designated Nazareth Regional High School (87a, 89a).

On March 25, 1974 Gordon phoned Keenan at his office and demanded that his union be recognized as representative of the teachers at the new school. At the hearing Gordon testified that Keenan told him on this occasion not to worry - that all of the

teachers at Nazareth would be hired by the new board. Keenan denied this and Petitioner introduced evidence at the hearing which indicated a clear intention on the part of the lay board not to be obligated to hire the entire staff at the old school (82a, 83a, 84a, 88a, 129a). Nevertheless, the ALJ credited Gordon's version and the Board found that since it was "perfectly clear" that Petitioner signaled its intent to hire all of the old staff on March 25, 1974, that it had an obligation to bargain with the Union on that date.

Because the Union had not obtained recognition from the lay board, it called a meeting on April 2, 1974 at the school for the purpose of deciding whether to conduct a selective strike at Nazareth in order to coerce the trustees, who had not as yet assumed control, into recognizing the Union (131a). The record reveals that only union members in good standing were permitted to vote. Other faculty who had previously resigned from the Union or who were not current in their dues obligation were not permitted to vote. The balloting resulted in a vote against a strike by a tally of 25-16 (TR-616-22). At this meeting substantial support was voiced for the formation of an unaffiliated labor organization restricted to the faculty of the new school, despite opposition by the Union leadership (TR-961).

Later on in the spring of that year the Union stepped up its efforts to gain recognition at the new school by sending a letter (126a) to the parents of the pupils which, among other things, accused the lay board of bad faith in not recognizing the Union, despite the fact that a faculty for the new school

had not been fully selected and no charter had been obtained from the State of New York. The existing faculty reacted sharply to the Union's letter and on June 3, 1974,41 members composed a letter to the parents which rebuked the Union for its inflammatory language and expressed support for the lay board and the new school (90a). The letter of June 3, 1974 was composed by a regular teacher, Charles Reiter, but circulated in part by department chairmen and coordinators, all of whom were covered by the existing Hald contract and for whom the Union was demanding bargaining rights along with rank and file teachers in the same unit. At the hearing all parties stipulated that department chairmen and coordinators were supervisors under the Act (35a). The letter from the faculty was responded to by still another letter from the Union to the faculty (127a) which allowed that the faculty had been duped and that their rights were being trampled. By this time Petitioner had formulated its initial terms and conditions of employment and sent them to those teachers on the staff of the old school whom it wished to employ. On June 20, 1974 Gordon once again wrote to Keenan and demanded recognition for the faculty at the new school, including department chairmen and coordinators (TR-1087). A provisional charter was granted to the lay board by the Regents for the State of New York on June 28, 1974 (26a).

Throughout the year 1973-74, which had commenced with a strike at all Hald schools which lasted until early November 1973,

many teachers had sought to resign from the Union but were rebuffed in their attempts to do so by Union treasurer and delegate Stephen Monroe who advised these faculty members that resignation could only be tendered during the 30-day period commencing October 1 of any given year (TR-1027). This probative fact was discussed extensively by the ALJ and figured prominently in his conclusion that the Union's subsequent dues checkoff list of April 1974 gave no support to the Union's claim of majority status in the Spring of 1974. The ALJ further observed that the fact of Monroe's supervisory status together with his refusal to permit the resignation of several faculty members from the Union during the final year at the old school, combined to make the Union's claim of uncoerced majority "an absurdity" (37a). The Board did not consider this issue, but nevertheless found the dues checkoff list (101-102a) to be probative evidence of majority support (65a).

Despite the Union's attempt to ward off loss of majority by erroneously and unlawfully restricting the time for tendering resignations, 18 written resignations were submitted by faculty members by September 1974 when the new school had commenced operations (141-158a).

While it is true that a majority of the non-supervisory teachers on Petitioner's workforce had been employed by the old school (a fact which moved the Board to find successorship) it is also true that the entire former workforce was made up of a nine school unit covered by one contract which included supervisors.

When the Petitioner commenced operations in September 1974 it had in its employ decidedly less than 50% of the multi-school work-force. The ALJ noted this salient fact and further observed that for purposes of computing majority status that the supervisors - once considered an integral part of the unit - also had to be separated out (35a). In any event, on October 16, 1974 a petition was signed by a majority of the new school's lay faculty formally seeking to decertify the Union (98a)(124a). Here again, the petition was signed also by statutory supervisors who played a major role in its circulation. The same supervisors were, of course, still included in the bargaining unit claimed by the Union.

On April 14, 1975 the Board's Regional office issued a complaint alleging, among other things, a failure and refusal to bargain based upon the alleged successorship status of Petitioner. The appropriate unit description excludes religious faculty who are employed by Petitioner. The complaint contains no allegation of unlawful conduct by Petitioner in formulating the initial terms and conditions of employment for the new school. Some three months prior, the Board had dismissed an RM petition filed by the Petitioner seeking an election among the new school faculty, excluding supervisors. The petition for an election (125a) was dismissed on the ground that no question concerning representation existed among the faculty at the new school.

James Mirrione was found by the Board to have been unlawfully denied employment by Petitioner because of his union activities. The record is barren of any evidence of union activity

on the part of Mirrione save his participation in picketing the school along with 34 other employees in the strike in 1973 (TR-317). Reversing its ALJ, the Board found discrimination in the refusal principally because of Petitioner's "other unfair labor practices" (75a) and the lack of explanation given to Mirrione for the refusal. At the hearing testimony was offered to show that Mirrione was not hired because as a religion teacher in a Catholic school he was "a personal disgrace" (TR-821) and that his unorthodox philosophy and immature attitude (45a) were not qualities sought by the new school (46a). The record also reveals that almost all of the 1973 pickets were hired by the new school and that some were even promoted into supervisory positions (46a).

On February 24, 1976 the Board issued its Decision and Order finding inter alia that Petitioner unlawfully failed and refused to bargain with the Union commencing on March 25, 1974, but that such obligation to bargain did not mature until September 1, 1974, some five months later.

ARGUMENT AND APPLICABLE AUTHORITY

I.

SUPERVISORY PARTICIPATION IN THE UNION HIERARCHY AND THE INCLUSION OF SUPERVISORS IN THE PUTATIVE BARGAINING UNIT PRECLUDES THE ISSUANCE OF A BARGAINING ORDER.

A. THE UNION IS A SUPERVISORY-DOMINATED LABOR ORGANIZATION INCAPABLE OF REPRESENTING PETITIONER'S EMPLOYEES.

Although the Board bypassed the issue, the record fully reflects that the character of the Lay Faculty Association is distinctly supervisory. Two of the four officers of the Union are statutory supervisors (TR-123-124). These persons participated during the negotiations for the collective bargaining agreement with the Hald Association. Stephen Monroe, the official union delegate at Nazareth Diocesan High School during its final year, was a stipulated supervisor within the meaning of the Act (35a). The record discloses that Monroe not only functioned as the elected Treasurer of the Union, but served as the grievance-handling representative of the Union at the former school (TR-409,410). Approximately one-sixth of the total union membership is comprised of department chairmen and coordinators - stipulated supervisors who were fully covered by the LFA contract with Hald.

The Union attempted to purge itself of this supervisory taint by causing the resignation of Vice-President Kranepool, and Treasurer Monroe during the hearing (38a). However, the record reveals that at all material times, the Union was permeated by supervisors at all levels. In fact, the Union's constitution

plainly indicates that membership is open to "all lay personnel employed in professional capacity", but that "supervisory personnel with the rank of vice-principal or above shall not obtain membership" (emphasis added) (105a).

This supervisory taint is covered by the Board's Alaska Salmon doctrine. In that case, 78 NLRB 185, the Board refused to accord a place on the ballot to a purported labor organization some of whose officers worked as cannery-worker foremen for the employer. The Board's reasoning on this critical point bears setting forth in full:

> "In view of the foregoing, we are of the opinion that the S.W.U. is incapable of serving as the bargaining representative of the employees herein. From the time it was conceived, persons who occupy supervisory positions with the Employer-Members have taken a prominent part in its affairs. Cannery worker foremen were not only among those who were responsible for the formation of the S.W.U. but they also served as officers in posts which normally influence a Union's policies and practices. Furthermore, its membership drive was conducted with direct and open assistance of cannery worker foremen. We have frequently stated that we will not accord a place on the ballot in an election conducted by the Board to a labor organization whose memberships are solicited by supervisors, or which is in any other way not free of managerial control. We find that Cannery worker foremen, by their activities on behalf of the S.W.U., have rendered the S.W.U. incapable of serving as the bargaining representative of the employees of the Employer-members. We shall, therefore, dismiss the petitions." Id. at 188.

The Board has adhered to this doctrine in subsequent cases. Kennecott Copper Corporation, 98 NLRB 75,77; American District Telegraph Co. of Pennsylvania, 89 NLRB 1635, 1637; Brunswick Pulp and Paper Company, 152 NLRB 973, 975.

There is no question but that supervisor Monroe took an

active if not zealous role in advancing the Union's cause at the Hald Association School. Although the Board did not refer to this critical issue in its decision, its Administrative Law Judge set forth Monroe's union advocacy in substantial detail. Referring to Monroe, the ALJ noted "he was a very enthusiastic unioneer, treasurer of the whole union -- delegate or leader -- of the Nazareth school union, and foremost activist on behalf of the Union in its activities vis-a-vis the employer on the other side" (37a). The Board's avoidance of the supervisory question within the context of a claimed violation of section 8(a)(5) of the Act is the more discouraging when viewed in the context of the ALJ's decided preoccupation with the problem: "Whatever dual activities of legal supervisors -- sometimes encouraging and even coercing employees into the union and sometimes pressuring them to get out -- mean in the context of a refusal to bargain case, is to be decided by legal principles in total, and not only partially" (35a). It appears that the Board did what the ALJ most abhorred about the General Counsel's treatment of the supervisory issue (41a); it treated it as though it did not exist. 1/

Leaving aside for the moment the issue of the Union's supervisory hierarchy, a bargaining order is not warranted in this case on the further ground that the Union's demands for recognition at all times embraced the department chairmen and coordinators.

1/ In the final pages of the transcript of the proceedings the ALJ specifically charged the General Counsel with the responsibility of explaining in his brief the novel theories advanced by the complaint (TR-1140-6).

Union president Gordon testified that his demand for recognition encompassed all of the people his union had formerly represented. (TR-1087). In this connection the General Counsel's exclusion of "supervisors" from the unit description set forth in the complaint (9a) does nothing to detract from the plain fact that the Union's prior contract with Hald and its subsequent demands on Petitioner included department chairmen and coordinators. It is against the bargaining unit boundaries in the previous contract and the scope of the Union's recognitional demands that the Petitioner's obligation to bargain must be measured. The ALJ clearly expressed the problem in footnote 5 of his decision (35a).

In NLRB v. Metropolitan Life Insurance Co., 405 F. 2d 1169, (2nd Cir. 1968) this Court refused to enforce an NLRB order which required the employer to bargain with a union in a bargaining unit which contained supervisors. The Court explained that the exclusion of supervisors from the protections of the Act and from bargaining units was designed, in part, to protect employees from supervisor influence within the union's organization. "If supervisors were members of and active in the union which represented the employees they supervise, it could be possible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job." Id. at 1178. The union membership and activities of supervisor Monroe and other department chairmen and coordinators has been fully established in the record. For the General Counsel to draft a complaint which excludes department

chairmen and coordinators from unit coverage is to misrepresent the Union's recognitional demand. The duty to bargain presupposes that the prior demand is for recognition in an appropriate unit, otherwise a basic condition of Section 9(a) of the Act is not met.

This Court and others have had no hesitation in refusing to enforce bargaining orders in units which include supervisors. Metropolitan Life Insurance Co., supra; Warner Company, 365 F. 2d 435, (3rd Cir. 1966); Gray Line Tours, Inc., 461 F. 2d 763, (9th Cir. 1972); Pacific Intermountain Express Co., 412 F.2d 1, (10th Cir. 1969). In those cases the courts focused mainly upon the question of substantial evidence supporting the Board's conclusion that the persons in dispute were not supervisors. Here there is no such controversy since all parties have stipulated that department chairmen and coordinators were statutory supervisors both before and after the transfer of the property to Petitioner on September 1, 1974. Thus, a clear-cut legal issue of supervisory inclusion in the Union's bargaining unit demand is presented to the Court. Since the statute does not sanction supervisory participation in employee-bargaining units it is difficult to understand the Board's conclusion that Petitioner violated the Act by refusing to recognize the Union in such a patently inappropriate unit.

This Court has refused to enforce a Board order requiring bargaining where the unit issue was far less compelling than in the present case. In Colecraft Manufacturing Co. v NLRB, 385 F. 2d 998, (2nd Cir. 1967) the Court was faced with the question of

whether an employer failed and refused to bargain in good faith in violation of section 8(a)(5) by declining to recognize the union in an overly broad, and thus inappropriate bargaining unit. There, the employer refused to recognize the union on the ground that its demand included 6 co-op students in addition to 52 production and maintenance employees. The Board took the position that the 6 students represented an "insubstantial variance" from the proper unit, and therefore, the employer was not justified in refusing to bargain in such unit. The Court rejected this contention noting that even where the union has a majority in both the requested unit and the appropriate smaller unit, the Act forbids the employer to bargain in an inappropriately large unit. In the present case, not only is the Union's unit demand inappropriate, but it is statutorily impermissible since it would have the incongruous and unlawful effect of requiring management to bargain with its own representative as well as its employees within the same unit.

B. HAD PETITIONER RECOGNIZED THE UNION AS URGED BY THE BOARD IT WOULD HAVE LAID ITSELF OPEN TO A CHARGE OF UNLAWFUL INTERFERENCE WITH THE ADMINISTRATION OF A LABOR ORGANIZATION IN VIOLATION OF SECTION 8(a)(2) OF THE ACT.

As detailed above, the makeup of the Union reveals supervisory participation at all levels. For Petitioner to have recognized the Union in the unit demanded would have involved plain violations of law. Here again, this issue was urged by Petitioner both at the hearing and in the post-trial briefs. In footnote 23 of its Decision and Order (67a) the Board notes that there is no

allegation of improper employer influence in union affairs or domination of the Union by the school in violation of section 8(a)(2) of the Act, as if to say that Petitioner's obligation to obey the law in this regard is triggered only by the filing of a charge. The Board, somewhat uncritically we believe, notes throughout its decision the anti-union conduct of certain supervisors as violations of section 8(a)(1), while ignoring the implications of the more substantial pro-union conduct of Hald supervisors both at the bargaining table and during the day-to-day administration of the Union. Petitioner was unjustifiably placed "on the horns of a dilemma" (Colecraft Mfg. Co. supra at 1007). If it refused to bargain in the unit demanded on September 1, 1974 and thereafter, it took the chance of being found guilty of violating section 8(a)(5) of the Act, as a charge alleging such violation had been filed in May of that year. On the other hand, if Petitioner agreed to bargain with the Union in the unit demanded -- leaving aside any considerations of good-faith doubt as to the Union's majority, NLRB v Midtown Service Co. Inc., 425 F. 2d 665, (2nd Cir. 1970) -- it would have risked violating section 8(a)(2) and (1) of the Act by interfering with the administration of the Union and the section 7 rights of the employees in general. Western Exterminator Company, 223 NLRB No. 181; Jeffrey Mfg. Co., 208 NLRB 75; E.E.E. Co., Inc. and David Salkin, 171 NLRB 982; Jansen Electronics Mfg., Inc., 153 NLRB 1555; Koehler's Wholesale Restaurant Supply, 139 NLRB 945; Dale Electronics, Inc., 137 NLRB 1212; Ruben Brown, d/b/a/ Ace Wholesale Electrical Co.,

133 NLRB 480; The Bassick Co., 127 NLRB 1552. See also Sperry Gyroscope Company, Inc. v NLRB, 129 F. 2d 922 (2nd Cir. 1942); and The Powers Regulator Company, 149 NLRB 1185, enfd. 355 F. 2d 506 (7th Cir. 1966) where the Board, under very similar circumstances, ordered the employer to withdraw recognition from assisted union unless and until it was certified by the Board as bargaining representative.

Under the foregoing circumstances, and long before the issuance of the complaint or the commencement of the hearing, Petitioner filed an RM petition with the regional office of the Board seeking an election in an appropriate unit for purposes of determining the majority status of the Union (125a). The Board's regional director dismissed this petition asserting that no question concerning representation existed in this case. This left Petitioner with a Hobson's choice of either litigating the matter or taking its chances by recognizing the Union in a tainted unit and exposing itself to violations of Section 8(a)(2) and (1). Therefore, it is arbitrary and unfair for the Board to say, as it does, that Petitioner did not question the Union's majority status until the commencement of the hearing (66a). The fact is that when Petitioner turned to the Board for assistance in resolving this difficult question, it was turned away and forced to litigate the issue.

II.

PETITIONER IS NOT A SUCCESSOR EMPLOYER WITH AN OBLIGATION TO BARGAIN UNDER THE LAW.

A. SUBSTANTIAL EVIDENCE DOES NOT EXIST ON THE RECORD AS A WHOLE TO SUPPORT THE BOARD'S FINDING THAT PETITIONER SUCCEEDED TO THE BARGAINING OBLIGATION OF THE HALD ASSOCIATION SINCE THE GENERAL COUNSEL FAILED TO PROVE MAJORITY STATUS. AT THE VERY LEAST, PETITIONER HAD A GOOD FAITH DOUBT CONCERNING THE UNION'S MAJORITY, WHICH IS A COMPLETE DEFENSE TO A VIOLATION OF SECTION 8(a)(5).

Any discussion of the question of successorship must begin with the decision of the United States Supreme Court in NLRB v Burns International Security Services, Inc., 406 U.S. 272 (1972). In that case, the Court articulated the now well-established principle that "where the bargaining unit remains unchanged and the majority of the employees hired by the new Employer are represented by a recently certified bargaining agent" the Board may order the new employer to bargain with the incumbent union. Id. at page 281. However, in this case there has been a radical restructuring of the bargaining unit so that it bears no resemblance to what had existed the previous year. The record indicates that Nazareth had been one constituent part of a nine-school bargaining unit operated by the Hald Association. When the school commenced operations on September 1, 1974, it was approximately one-ninth the size of the original Hald contract unit. In addition, the General Counsel's complaints further refined the previous unit by carving out department chairmen and coordinators because of

their supervisory status. On September 1, 1974 Petitioner amounted to a rather small segment of the prior multi-school unit wherein the Union had enjoyed majority status by presumption. Brooks v NLRB, 348 U.S. 96, 103 (1954); NLRB v Frank Gallaro and Joseph Gallaro D/B/A Gallaro Bros., 419 F. 2d 97 (2nd Cir. 1969); NLRB v Gulfmont Hotel Co., 362 F. 2d 588,589,592 (5th Cir. 1966); NLRB v Local 3, IBEW, 362 F. 2d 232,235, (2nd Cir. 1966); NLRB v Whittier Mills Co., 111 F. 2d 474, 478, (5th Cir. 1940). But the presumption of continuing majority which runs to the Union in the multi-school unit does not necessarily apply to a severed single-school unit which has been cut down still further by the elimination of department chairmen and coordinators. Indeed, the cases indicate to the contrary. And if majority status cannot be proven by presumption or otherwise, there can be no finding of successorship since the statute requires majority status in all cases. 29 U.S.C. Section 159 (a) provides that "representatives designated or selected for the purpose of collective bargaining by the majority of the employees in the unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining..." See also NLRB v Burns International Security Services, supra, at 276.

In NLRB v Sheridan Creations, Inc., 357 F. 2d 245, (2nd Cir. 1966), this Court made clear that a union's majority status in a multi-employer bargaining unit must be measured against all of the employees in the unit and not against those of any particular

employer in the Association. The same principles would apply to the measurement of majority status in a multi-school bargaining unit operated by a single employer. The relevant inquiry is whether the Union, by virtue of its presumed majority in the overall unit, achieved majority status in the Nazareth Regional unit once operations commenced independently of the Hald Association. The Court of Appeals for the Sixth Circuit has reviewed this question and concluded that the withdrawal of an employer from a multi-employer unit is sufficient to rebut the presumption of continuing majority which runs to the multi-employer contract unit where the employer has asserted a good faith doubt concerning the union's majority. NLRB v Downtown Bakery Corp., 330 F. 2d 921 (6th Cir.1964) 2/. And in NLRB v Richard W. Kaase Co., 346 F. 2d 24 (6th Cir. 1965) the Court, faced with the same issue, observed that before the continuance of the fact of majority support can be presumed, the original existence of the fact must be established. Indeed, in that case, the Court held that the question of the c pany's good faith doubt was irrelevant in view of the General .sel's failure to prove majority status by any positive evidence. This view appears to have been accepted by the Court of Appeals for the District of Columbia, International Association of Machinists and Aerospace Workers, AFL-CIO v NLRB, 489 F. 2d 680, footnote 2. The Board's own cases also indicate that there is a point beyond which the presumption of continued majority cannot be indulged. United States Molded Shapes, 141 NLRB 357; American Concrete Pipe

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2/ Strangely enough, this case is cited by the Board in support of its successorship finding (64a).

of Hawaii, Inc., 128 NLRB 720. Since the presumption is of no use to the Union in this case, and since the General Counsel did not affirmatively prove majority status at the hearing, there is no support in the record for the Board's conclusion that the Union represents a majority of Petitioner's employees.

B. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S CONCLUSION THAT PETITIONER DID NOT HAVE A GOOD FAITH DOUBT AS TO THE UNION'S MAJORITY STATUS AMONG ITS FACULTY.

Assuming, arguendo, that the Union was entitled to a presumption of continuing majority so that an arguable case of successorship could be shown, the record fully supports the Petitioner's claim that on September 1, 1974, and thereafter, it maintained a good faith doubt based upon objective considerations concerning the Union's majority status. The leading case of Celanese Corp.of America, 95 NLRB 664, appears to be particularly applicable to the present situation. In that case, the Board considered the substantial change in the composition of the bargaining unit and the significant number of former strikers who had crossed the union's picket line to return to work during the strike to be objectively supportable criteria upon which the company based its doubt of the union's majority. The situation in the present case, while not being exactly the same, is nevertheless notably like that in Celanese.

The radical alteration of the bargaining unit in both scope and composition attests to Petitioner's belief that the Union did not represent a majority. In addition, the record reflects that approximately 20 teachers at Nazareth Diocesan crossed the picket line during the strike in October 1973 and returned to their jobs (TR-812). In addition, Petitioner was aware that the Union's proposed strike in the spring of 1974 which would have been limited to Nazareth, was soundly defeated in a secret ballot election on April 2, 1974, even though non-union faculty and members not in good standing were not permitted to vote (TR-904-911). Beyond that, support for a separate, unaffiliated labor organization was expressed at this meeting, despite union leadership opposition. The facts show that stipulated supervisors, bargaining unit members, were present during this meeting thereby nullifying the notion that Petitioner was unaware of this desire for separate and different representation. Further, on June 3, 1974, 41 members of the faculty signed a letter repudiating the Union for misrepresenting their views to the parents concerning the transfer of the school to the Petitioner's Board of Trustees. The Union's opposition to the transfer of the school from the Hald Association to Petitioner were subjects of obvious and real apprehension to the faculty (TR.390-1, 936-9, 951, 959, 991). Most importantly, Petitioner received copies of 18 written resignations of teachers from the Union which clearly indicated a lack of support for that organization. These resignations, combined with the knowledge that the Union had forestalled further resignation by rejecting

them as untimely, obviously put Petitioner on notice that a strong sentiment existed against the Union among the faculty. Finally, on October 16, 1974, 31 members of the Union signed a petition seeking to decertify the Union as the bargaining representative of the faculty.

In the face of this evidence of disaffection with the Union, Petitioner took the only course available to it in order to bring the dispute to a prompt and peaceful conclusion. As noted, on January 21, 1975, it filed an RM petition with the Board seeking an election among the faculty. This is clearly the method contemplated by the statute and preferred by the courts. Brooks v NLRB, supra, at 103; Terrell Machine Co., 173 NLRB 1480, 1482; Barrington Plaza, 185 NLRB 962, 964.

The foregoing factors, including the diminution of the scope and composition of the unit, the resignations from the Union, the written repudiation of the Union by its members, the defeat of the Union's strike recommendation in the Spring of 1974, and the decertification petition filed in October 1974, represents a clear and convincing evidence that Petitioner maintained a good-faith doubt concerning the Union's majority. It ought not now to be held in violation of the law after having done all in its power to solve the problem fairly and expeditiously.

C. SUBSTANTIAL EVIDENCE DOES NOT EXIST BASED ON THE RECORD AS A WHOLE TO SUPPORT THE BOARD'S CONCLUSION THAT PETITIONER VIOLATED THE ACT BY UNILATERALLY FORMULATING THE INITIAL TERMS AND CONDITIONS OF EMPLOYMENT OF ITS FACULTY.

It should be noted at the outset that there is no allegation in the General Counsel's complaint which puts Petitioner on notice that the formulation of its initial terms and conditions of employment in any way violated the Act. The Complaint cannot fairly be read as tendering this issue. In fact, the General Counsel specifically disclaimed at the hearing that Petitioner should be held bound by the terms of the old contract (TR-386). The issue was not litigated at the hearing, yet the Board had no reservations about finding such a violation and proceeded to order Petitioner to restore the old terms and conditions of employment and make the employees whole for any loss of pay or benefits, if any. This kind of summary treatment was rejected by this Court in NLRB v Majestic Weaving Co., 355 F. 2d 854, (2nd Cir. 1966), where it was pointed out that the time for giving notice of the matters of fact and law asserted is prior to the hearing. There, Judge Friendly observed both the Administrative Procedure Act, 5 U.S. Code, Sec. 1004, and the Board's own rules and regulations require that the Complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." Petitioner had no notice that its initial terms and conditions of employment were under attack by the Board. Evidently, neither did the General Counsel. The ALJ appeared to be of the same view since he did not discuss the matter at all. Thus, it was the Board which raised the issue for the first time

in its decision. "Where an agency determination goes beyond the issues framed by the complaint, a serious question must arise whether a respondent has not been denied a full and fair hearing on the unlawful conduct with which it has been charged." NLRB v Majestic Weaving Co., supra, at 861.

In addition to the procedural infirmities in the Board's order, its findings in this area clearly lack support in the record. The Board's finding in this regard is based squarely upon the credited testimony of Union president Gordon that in his telephone conversation with Petitioner's acting chairman, Thomas Keenan, on March 25, 1974, Keenan assertedly told him that all of the faculty of the old school would be rehired by the Petitioner. From this, the Board reasoned that it was "perfectly clear" that Petitioner was going to employ all of the old work force and therefore, as Burns indicates, it was appropriate for Petitioner at that time initially to consult with the Union concerning the fixing of the employment terms. Quite apart from the question of credibility (Keenan denied having made such a commitment to Gordon) the record evidence indicates that it was anything but "perfectly clear" that Petitioner intended to bring over all the old employees into its work force (82a,83a,84a,88a,129a). So, too, does the testimony of Richard Miskiewicz (TR-471-94) and Richard Settani (TR-1046) who both expressed concern during this period as to whether they were to be hired by the new institution. Nevertheless, the Board found this credibility resolution to be "the central fact" (70a) and ordered Petitioner to recognize and, upon request, bargain

with the Union regarding fixing of initial terms and conditions of employment after March 25, 1974.

The Board takes the position that since "this intention to retain the former Hald teachers was expressed by Thomas Keenan on March 25, 1974, it became appropriate at such time that Respondent Nazareth consult with the Union before imposing initial terms" (69a). (emphasis added). Further on in its decision the Board states "having found that during the period in question the Union was entitled to recognition as the teacher's bargaining agent in an appropriate unit, we further conclude that Respondent Nazareth was obligated to bargain with the Union concerning the Standard Employment Agreement, which was sent directly to the teachers" (70a). And yet, on page 5, and on footnote 18 of its Decision and Order (63a, 66a), the Board unequivocally states that Petitioner's duty to recognize and bargain with the Union did not mature until September 1, 1974 when it commenced operations. The apparent inconsistency of these statements is not easy to resolve. If the Board is suggesting that Petitioner did not have an obligation to recognize and bargain with the Union on March 25, 1974, but nevertheless had an obligation initially to consult with the Union concerning the fixing of initial terms, it is submitted that a new concept of "partial recognition" has been brought forth into the field of labor relations. There is no known principle of collective bargaining which contemplates recognition for a limited purpose. To "initially consult" with the Union over the fixing of terms and conditions is to recognize and bargain with the Union. There

is no middle ground. It makes no sense for the Board to say that Petitioner's obligation to bargain did not mature until September 1, 1974 when in the next breath it solemnly pronounces an unfair labor practice stemming from Petitioner's failure to bargain with the Union before that date.

Finally, the Board's own caselaw dispositively indicates that it could not have been perfectly clear that Petitioner had intended to retain all of the employees in the unit. The record plainly indicates that offers of employment began to be extended by Petitioner in the beginning of April 1974 (TR-44)(129a) and continued through the summer. In Spruce Up Corp., 209 NLRB 194,195 the Board stated:

> "When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can be fairly said that the new employer 'plans to retain all of the employees in the unit' as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one..."
>
> "We believe the caveat in Burns, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment..."

For similar Board holdings see United Maintenance and Mfg. Co., 214 NLRB No.31; Boeing Co., 214 NLRB No.232; Raymond Convalescent Hospital, Inc., 216 NLRB No.85; and Henry M. Hald High School Association, 213 NLRB No.54.

It is clear from the record that Petitioner had never indicated an intention to take over all of the old employees and never foreclosed itself from formulating its own terms of employment.

D. SUBSTANTIAL EVIDENCE DOES NOT EXIST ON THE RECORD AS A WHOLE TO WARRANT THE BOARD'S EXCLUSION OF RELIGIOUS FACULTY MEMBERS FROM THE APPROPRIATE BARGAINING UNIT.

The Board based its finding of an appropriate faculty unit excluding religious teachers "on the basis of the entire record" and its decisions in Henry M. Hald High School Association, The Sisters of St. Joseph, supra; and Seton Hill College, 201 NLRB 1026 (1973). Although the Board did not articulate the reasons for the exclusion of the religious, it appears that the only arguable basis in the record for their exclusion would be the diminished salary paid to religious as compared to lay teachers and the vows of poverty and obedience which the religious teachers take at the beginning of their careers.

The record reflects that the religious teachers receive an annual salary of $6,200 which amounts to approximately half of that paid to the lay faculty. Militating against the exclusion of the religious teachers are the more persuasive factors such as the identity of professional preparation necessary to hold such a position on the faculty as well as the same job duties and functions undertaken by the religious inside of the classroom. Thus it is clear that the educational requirements and the job-related duties of the religious are absolutely coextensive with

those of the lay faculty. Moreover, the contract between the individual teacher and the Petitioner is fully applicable to the religious teachers. Brother Matthew Burke testified, without contradiction, that whatever benefits the lay teacher is eligible for, so too is the religious teacher (TR-69). The only exception to this is the annual salary paid to each. Thus, when all of the individual factors are considered it is evident that an identical community of interest exists between the two types of employees. Indeed, the only discernible difference between the two, apart from salary, is that one is a member of a religious order while the other is not.

The cases cited by the Board in support of its exclusion of the religious are clearly distinguishable on their facts. In Seton Hill College, the religious employees were excluded from the bargaining unit because of a "complex" relationship between the individual religious teacher and the owners of the school. In that case the Order owned and administered the College. The Mother General of the Order was also a member of the board of trustees. Because of this, the Board found that a religious faculty member would have a conflict of loyalties owing to the control of the school by persons to whom they were subordinate within the context of their religious lives. Further, the Board found that the fringe benefits of the two groups differed substantially. None of these factors are present in this case. Rather, the record shows that the school is owned and operated

by a board of lay trustees who do not exercise any control or supervision over the religious lives of these faculty members. There is no record evidence to the effect that the Superior General or other person in authority within the religious order also sits on the lay board of trustees. In fact, such is not the case. In the Sisters of St. Joseph case, the Board's unit exclusion of religious appears to be based upon its decision in Seton Hill.

Under the circumstances, the Board's exclusion of religious from the faculty bargaining unit is not based upon substantial evidence. Although the courts have traditionally given great latitude to the Board in areas of unit placement, they have not given the Board freewheeling authority to exclude employees from the equal protection of the law because of their religious views or lifestyles.

The fundamental rights of free exercise of religion are at issue here, for the Board cannot exclude religious without erecting an artificial barrier between the lay and religious faculty. There is, after all, only one faculty at Petitioner's institution. The necessary implication in the Board's unit findings is that Petitioner has two faculties, one religious and one lay, but both full time,working side by side. A denial of representational rights in critical areas such as seniority, tenure, sabbatical leave, grievance and arbitration procedures, sick leave, academic freedom, class load, and teacher evaluations -- all matters of common concern to both religious and lay faculty -

is a simple denial of the equal protection of the laws and discrimination based upon the exercise of religion. Indeed, we do not understand the Board even to have vouchsafed to the religious faculty the right to form their own bargaining association. All that can be gleaned from the Board's decision is that they may not be included in the unit.

Because this appears to be the initial judicial review of such a Board policy, the outcome goes well beyond the particular issues of this case. We are greatly concerned that judicial approval of the Board's action in this case will be interpreted as a license to continue this arbitrary policy of exclusion on the basis of "settled law" rather than the facts of a given case. Indeed, since the Board did not set forth any facts upon which its unit exclusion is based 3/, but only cited the two cases discussed above, Petitioner's fears in this regard would appear to be well grounded.

Freedom to hold religious beliefs is absolute and is not subject to governmental regulation. Cantwell v Connecticut, 310 U.S. 296 (1940). Where governmental action directly interferes with or burdens an individual's exercise of his religion, such action may be justified only by a compelling governmental interest. Wisconsin v Yoder, 406 U.S. 205 (1972); Sherbert

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3/ The ALJ's description of the religious as "monastic order members" (41a) is inaccurate. These teachers do not lead a cloistered existence. They work and live in the secular world.

v Warner, 374 U.S. 398 (1963). In this matter the NLRB is clearly denying religious members of the faculty their federally secured right to engage in collective bargaining on the pretext that they share an insufficient community of interest with their colleagues. In our view, this constitutes an unwarranted interference with their religious beliefs as their is no compelling governmental interest to justify such an exclusion.

III.

NO SUBSTANTIAL EVIDENCE EXISTS ON THE RECORD AS A WHOLE TO SUPPORT THE BOARD'S FINDING THAT PETITIONER VIOLATED SECTION 8(a)(1) OF THE ACT BY THE ACTIONS OF ITS SUPERVISORS IN THE CIRCULATION OF AN ANTI-UNION LETTER AND THE FILING OF A DECERTIFICATION PETITION ON JUNE 3, 1974 AND OCTOBER 18, 1974 RESPECTIVELY, AND BY BROTHER BURKE'S REMARKS AT THE FACULTY MASS ON SEPTEMBER 4, 1974.

In reversing its ALJ and finding that Petitioner had violated Section 8(a)(1) of the Act by the conduct of certain department chairmen and coordinators in circulating anti-union materials among the faculty, the Board placed total reliance upon the supervisory status of these individuals. The Board stated: "Crucial to our finding is that the teacher employees were aware that Supervisors Holmes and Serpico were engaged in soliciting signatures on the letter, and that they were recommending the signing of the letter" (67a). Significantly, there is no evidence that the words or conduct of these persons was coercive irrespective of the supervisory source. In fact, the evidence points to the contrary (TR-926,942,1011).

The Board applied the universally accepted principle that supervisory solicitation of employees to reject the union once a bargaining relationship has been established is coercive by its very nature, and therefore violative of Section (8)(a)(1). However, because of the particular facts of this case the Board's

analysis falls short of the mark in a number of respects. To begin with, the record and the Board's decision itself conclusively demonstrate that on June 3, 1974 it was Hald and not Petitioner which was the employer of these supervisors. The Board stated several times in its decision that Petitioner's obligation to bargain did not commence until September 1, 1974 because it was not until that point that Nazareth had hired its full complement of employees. The complaint which initiated the unfair labor practice proceeding clearly states that Respondent Hald operated the School through August 31, 1974 (9a) and that Petitioner Nazareth took over the operations on September 1, 1974. Therefore it is plainly impossible for Nazareth to have violated Section 8(a)(1) on June 3, 1974. Yet even if Nazareth had been in control of the employment relationship on that date, there would be no violation because of the unusual nature of the "collective bargaining activities that went on at all times before the hearing in June 1975" (38a).

As discussed in Point I above, the Hald contract as well as the Union's recognitional demand encompassed both department chairmen and coordinators. These individuals participated in the collective bargaining process to the same extent and in conjunction with the employees whom they supervised. This splitting of the supervisor's loyalties, so fraught with potential conflict, was abided by the Union and Hald throughout several contract negotiations. Prior to the transfer of Nazareth to Petitioner all parties regarded department chairmen and coordinators as an integral part of the unit, and the ALJ so found (40a). Under these circumstances

it is unreasonable and illogical for the Board to find that the activities in question violated the Act. If these particular individuals had always been regarded as unit employees it is not strange that they comported themselves as unit employees by signing their names on the same documents as the non-supervisory faculty. The Board's subsequent exclusion of these faculty from the complaint's unit description cannot be used as an artifice to stamp "unfair" what had been stamped "fair" a few short months before. Majestic Weaving Co., Inc., supra at 860.

Despite Petitioner's citation of Board and Court cases which hold such conduct not to be violative of Section 8(a)(1), the Board reversed its ALJ and found violations on the authority of Suburban Homes, 173 NLRB 497 and Big Ben Department Stores, Inc. 160 NLRB 1925, enfd. 396 F. 2d 78 (2nd Cir. 1968). An examination of these cases sheds no light on the issue because none deal with anti-union conduct of supervisors who are part of the contract bargaining unit or who are part of the putative bargaining unit the union claims to represent. Rather, the Board's own Montgomery Ward doctrine is dispositive of the controversy. In that case, 115 NLRB 645, enfd. 242 F. 2d 497 (2nd Cir.) the Board stated at 647:

> "...the Board has generally refused to hold an employer automatically responsible for the anti-union conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for an on behalf of management." (Emphasis added)

This rule has been uniformly followed by the Board to the present date. See particularly Cosmopolitan Studios, Inc., 127 NLRB 788, 791; Breckenridge Gasoline Company, 127 NLRB 1462, 1463 and ftnt. 4; Hy-Plains Pressed Beef, Inc., 146 NLRB 1253, 1254; The Powers Regulator Company, supra at 1188. In view of the full participation of department chairmen and coordinators in the collective bargaining of the past, the Board's findings in this area are lacking in substantial evidence, particularly since there is no evidence upon which to base an inference that Petitioner in any way initiated or supported the anti-union petitions (TR-1023).

THE FACULTY MASS

While it is recognized that the Board's finding concerning the events of Sept. 4, 1974 rests upon a credibility resolution of its ALJ which this Court understandably would be reluctant to disturb, Petitioner asserts that this finding is not based upon substantial evidence and therefore, credibility resolutions notwithstanding, it should not be permitted to stand. There is uncontradicted, and therefore accepted testimony in the record that principal Burke was very concerned that the new school would be strangled in its infancy by the acrimony and contention which marked the final year of the old school. There was vivid testimony concerning faculty members shouting at each other in front of students, slamming doors, epithets of "scab", etc. (46a) - all related to the October 1973 strike and its aftermath. Burke made it clear to the faculty on Sept. 4, 1974 that a continuation of such behavior would not be tolerated in the new school and that if it did reoccur that he would take "swift and severe" action to curtail it. From this the Board concluded that Burke was referring to the strike participation of certain of the faculty the previous year and that his remark amounted to a threat of reprisal if they embarked on another strike. Importantly, one of the General Counsel's own witnesses called to testify concerning this episode candidly admitted that Burke had "undoubtedly" been referring to the atmosphere of uncivility which characterized the old school faculty

after the strike (TR-401-2).

It is not surprising that an institution which is founded upon the sharing of religious ideals and a strong sense of community and cooperation would be apprehensive that the strife of the old school would be carried over to the new. And if the school's principal undertakes stern warning measures to prevent this from happening, we do not see why the Board is warranted in drawing an inference that Petitioner intended to chill the hearts of those who might be inclined to engage in some future strike. The advertance by Burke to the strike in October, assuming it occurred, was a logical way of referencing the anti-social attitudes which prevailed after it ended. For the Board to conclude that the mere mention of the word "strike" in the course of a ten minute homily militates against the lawfulness of the remarks in general, is to pay excessive homage to one word and overlook the plain meaning of the entire address. Cf. Advance Business Forms Corp., 474 F. 2d 457 (2nd Cir. 1973).

The testimony in the record considered as a whole, combined with the distinctly uncoercive setting for the remarks, makes the Board's finding one based on insubstantial evidence.

IV

SUBSTANTIAL EVIDENCE DOES NOT EXIST IN THE RECORD AS A WHOLE TO SUPPORT THE BOARD'S FINDING THAT JAMES MIRRIONE WAS REFUSED EMPLOYMENT BECAUSE OF HIS UNION OR OTHER PROTECTED ACTIVITIES.

A. THE BOARD DID NOT HAVE POWER TO MAKE A FINDING OF DISCRIMINATORY DISCHARGE SINCE NO CHARGE WAS FILED WITHIN SIX MONTHS OF THE ASSERTED UNLAWFUL REFUSAL TO HIRE.

Section 10(b) of the Act instructs that no finding of an unfair labor practice may be made which is based upon events taking place more than six months prior to the filing of the charge. The charge in Case No. 29-CA-4158 states that "since on or about September 1, 1974 ... the Employer has interfered with, restrained and coerced...its employees..." by refusing to hire Mirrione. That charge was filed on December 24, 1974. However, the record shows that Mirrione was told by Brother Burke on June 13, 1974 that he would not be rehired for the coming year (TR-222-4). Paragraph 24 of the General Counsel's complaint specifically cites June 13, 1974 as the commencement date of this asserted unfair labor practice (11a). The Board brushed aside this impediment with the footnote observation that "this non-renewal was effective September 1, 1974, and the charge so alleges" (76a). The fact is that the General Counsel tried the case on the theory that the unfair labor practice took place on June 13, 1974 and thereafter. The Board has effectively stretched the statutory period of limitations by relegating the nature of the June 13, 1974 notification to one of an incipient unfair labor practice. It focused

on September 1, 1974 as the initial date of discrimination, the complaint allegation notwithstanding. Thus, a Board-created twilight zone exists between June 13, 1974 and September 1, 1974 when the new school opened. Yet the notification to Mirrione that he would not be hired for the coming school year was a fully consummated act at that time. Assuming such action to be unlawfully motivated, Mirrione "knowingly then sustained an immediate injury under the Act which could have been remedied had he filed charges within the statutory 6-month period of limitation." Bowen Products Corporation, 113 NLRB 731, 732. The clear implication of the Board's position is that had Mirrione filed a charge before September 1, 1974, it would have been powerless to investigate the matter because no violation could exist until that time -- an absolute variance from the language of the complaint.

The test which this Court has considered controlling is whether the charging party could have filed a charge at any time after being on notice of the alleged discriminatory Act. Communications Workers v. NLRB, 520 F.2d 411 (2nd Cir. 1975). Since the Charging Party in this case obviously could have filed a charge on June 13, 1974 and thereafter, but chose not to until December 24, 1974, the Board erred in disregarding Petitioner's procedural defense.

B. IN REVERSING ITS ALJ, THE BOARD MARSHALLED EVERY POSSIBLE UNFAVORABLE FACT AND INFERENCE AGAINST PETITIONER IN ORDER TO SUPPORT AN UNLAWFUL REFUSAL TO HIRE, WHILE TREATING AS NON-EXISTENT THE SUBSTANTIAL EVIDENCE TO THE CONTRARY.

Two major factors characterize the Board's unfair labor practice finding concerning Mirrione: 1) The burden of proof was completely reversed and Petitioner was placed in a position of having to explain to the satisfaction of the Board why it did not offer employment to one teacher while nearly all other members of the old Nazareth Diocesan school were offered employment, 2) the Board rejected Petitioner's explanation out of hand and searched the record for any possible means to make out a violation of law. It is hard to say which is the more exasperating.

While it is clear that the ALJ was not particularly impressed with some of the reasons advanced by Petitioner for its refusal to hire, he nevertheless recognized that the complaint allegation required some species of union activity on the part of Mirrione to be sustainable. The record reveals that Mirrione was one of thirty-five persons who participated in the picketing of the school in the strike of October 1973, almost a year before (TR-217). This constitutes the totality of the protected, concerted activity of Mirrione which was known to the Petitioner. All of the Board's efforts to locate anti-union inferences in the record cannot change that one salutory fact. The critical question here is whether the participation of one person out of thirty-five in strike support activities nine months before a refusal to hire constitutes a prima facie case of discrimination sufficient to place the burden of going forward on a respondent to explain the refusal.

Among the factors noted by the ALJ which led him to conclude that insufficient evidence existed to support the complaint

allegations were 1) the lack of any union activities by Mirrione beyond the activities of the bargaining unit as a whole, 2) the fact that other teachers who were not hired also engaged in the strike, 3) quite active strikers were hired and even given promotions (46a). Also worthy of note is the fact that Mirrione was actually hired back by Brother Matthew after the strike for the remainder of the 73-74 school year. This post dates his last known spurt of union activity. It borders on the absurd for the Board to find that Petitioner, through Brother Burke, refused to hire Mirrione because of his past activities when that same person had offered him reinstatement right after the strike when Hald was in charge of the school. If Mirrione's picket line participation was such a singular source of irritation to Burke, logic dictates that he would have acted to bar him from re-employment at that time rather than a year later when the school became independent of Hald. Further, if Petitioner had a mind to discriminate against anyone for union activity, delegate Monroe would have been a more likely target than anyone else, since Petitioner could have discharged him with impunity because of his supervisory status.

In short, the Board placed the burden of proof on the Petitioner rather than on the General Counsel as the ALJ had correctly done. In NLRB v. River Togs, Inc., 382 F.2d 198, (2nd Cir.-1967), this Court cautioned the Board against holding "the employer to a standard...of rebutting every possible inference consistent with discrimination." In that case the Court noted that

evidence supporting a conclusion of unlawful discrimination may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than where he has reached the same conclusion. See also Atlanta Newspapers, Inc., 172 NLRB 1422; Watkins Center, 156 NLRB 443, 444; and Sweetheart Plastics, 209 NLRB 776, 777 where the Board, in finding insufficient evidence of discrimination, placed special reliance upon a lapse of time between union activity and termination, shorter than that present here.

That the Board saw fit to reverse its ALJ and sweep aside, without comment, those elements which disprove the complaint allegation is a fact which speaks for itself. When Mirrione scolded a fellow employee because of his participation in the mini-marathon, an important fund raising function, he was not engaged in any protected concerted activity, despite the Board's unsupported characterization of this as "union activity" (72a). The ALJ correctly noted that by his refusal to help in this activity "Mirrione definitely lessened his desirability on the faculty of a school in financial stress" (45a). Mirrione's unorthodox position on the sacrementality of marriage (46a) was another important factor which Petitioner had a right to consider especially since Mirrione was a religion teacher in a Catholic school. His mode of dress, his immature behavior (TR-764) were also relevant factors which Petitioner could review in fixing his worth

to the new school. The fact that he had received satisfactory evaluations from his former department chairman or that the Principal, Burke, had not spoken to him of his shortcomings [4/] in the final year does not detract from the fact that the Board of Trustees had a right to be concerned about the unorthodox attitudes and disruptive behavior of a prospective religion teacher in its school.

Probably the most probative piece of evidence showing Petitioner's concern about the quality of the teaching of religion in the new school lies in the pre-strike memorandum which Brother Matthew distributed to the religion department. Following are excerpts from the memorandum which Brother Matthew personally discussed with the department members after the strike:

"With this in mind and with the experiences of last year as my guide, I make the following remarks:

> that the members of the religious education department recognize that the school will look for individuals enthusiastic in their academic work and thoroughly committed to the development of a strong Christian community. Personal but overt "hang-ups" with the faith which manifest themselves in rank insecurity, outrageous and unorthodox behavior will not be tolerated in the department and school. I would include here the proselytizing of moral positions contrary to the established Church teaching (135a).
>
> . . . .
>
> that the courses presently being offered, be purged of excessive individiaul preferences, particularly those that reflect the extremely esoteric, turned-off philosophical preferences of individual religion teachers (135a).

4/ Brother Matthew testified that one of the reasons why he held back during this period was because of his fears that anything he said or did would have been twisted into anti-union speech or conduct by the Union (TR-823), a fear which has been borne out by the Board's findings.

. . . .

(3) Student Performance:
(a) that student accountability be reviewed and revised this year; that grades be understood by students (how & why such a grade was given, etc.); that final exam grades be given only when final exams are given; that final exams be distributed only after you have examined same and given approval; finally, that the number of failures be decreased significantly." (139)

The foregoing criticisms of Brother Burke existed on the record before the strike took place and thus before any union activity on the part of Mirrione.

Finally, the tenuous nature of the discharge finding is revealed by the Board's resort to Petitioner's "other unfair labor practices" as evidence of its unlawful motivation. Not only are there no "other unfair labor practices" present with which to condemn Petitioner, but this Court has previously warned the Board against such free-wheeling use of that phrase. In NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725 (2nd Cir.-1965) Judge Friendly stated at 727:

> "But when a party that has erred in the past places itself in the hands of capable counsel who gives reasonable advice for the future, and there is a significant improvement in its conduct, it ought not be viewed as having such a propensity for sin that every episode is given the worst interpretation, or be condemned by indiscriminate repetition of the phrase that its conduct 'must be assessed against the background of its earlier unfair labor practices. . . '"

As noted, there are no previous unfair labor practices in the past of the Petitioner. It is also significant that the

Court in Park Edge Sheridan Meats noted once again that the Board's evidentiary findings may be more open to question when they run counter to those of a trial examiner who has observed the witnesses and issues first hand.

In sum, the Board's order requiring the reinstatement of Mirrione strikes at the heart of a religiously oriented institution such as Petitioner's school. Devotion to religious beliefs is the major reason why the school exists in the first place. Personal conduct and teaching methods which run counter to those ideals - and which have nothing to do with union or other concerted activities - should not be imposed upon such an institution.

The record as a whole shows that Mirrione was not the subject of unlawful discrimination in any degree. Petitioner's decision not to hire him was motivated solely because of its belief that he should not be teaching religion in its school.

CONCLUSION

It is submitted that the Board's findings of fact and conclusions of law are not based upon substantial evidence and that the Board's order should be denied enforcement in its entirety.

Respectfully submitted,

CLIFTON BUDD BURKE & DeMARIA
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Of Counsel:
Kevin J. McGill

AFFIDAVIT OF SERVICE BY MAIL

Re: Nazareth Regional High School

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF New York ss.:

v-

The NLRB

Julius Golden, being duly sworn, deposes and says that he is over 18 years of age. That on the 30th day of June, 1976, he served 3 copies of the within Brief and 2 Appendix upon Elliott Moore, the attorney for the the above-named Respondent, by depositing 3 and 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Canal and Church Streets, addressed to said attorneys for the Respondent at No. 1717 Pennsylvania Ave., Wash. D.C. 20507 that being the address within the State designated by them for that purpose upon the preceding papers as the place where he regularly kept an office, and at which place they regularly received mail.

Sworn to before me this
30th day of June, 1976.

Julius Golden

ABRAHAM L. MEILEN
Notary Public, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1978